

E-FILED 01-25-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BERNICE JACOBS,

No. C10-04596 HRL

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS THE
COMPLAINT WITH LEAVE TO
AMEND**

v.

BANK OF AMERICA, N.A.; BAC HOME
LOAN SERVICING, LP; RECONTRUST
COMPANY; FEDERAL NATIONAL
MORTGAGE ASSOCIATION, DOES 1-100,

[Re: Docket No. 7]

Defendants.

Plaintiff Bernice Jacobs sues for alleged statutory and common law violations in connection with her home mortgage. She filed a complaint in state court, asserting nine claims for relief: (1) Violation of California Civil Code § 2923.6; (2) Violation of California Business & Professions Code § 17200; (3) Breach of Covenant of Good Faith and Fair Dealing; (4) Injunctive Relief; (5) Violation of California Civil Code § 1572; (6) Fraud; (7) Declaratory Relief; (8) Intentional Misrepresentation; and (9) Wrongful Foreclosure. Defendants removed the matter here, asserting diversity jurisdiction.

Pursuant to Fed. R. Civ. P. 12(b)(6), all defendants now move to dismiss the complaint for failure to state a claim for relief. Alternatively, defendants move to strike portions of the complaint pursuant to Fed. R. Civ. P. 12(f). Plaintiff opposes the motion.¹ All parties have

¹ Plaintiff failed to timely oppose the motion. The court subsequently granted her request for relief and re-set the briefing and hearing deadlines.

1 expressly consented that all proceedings in this matter may be heard and finally adjudicated by
2 the undersigned. 28 U.S.C. § 636(c); FED. R. CIV. P. 73. Upon consideration of the moving and
3 responding papers, as well as the arguments of counsel, this court grants the motion and will
4 give plaintiff leave to amend some of her claims.

5 LEGAL STANDARD

6 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests
7 the legal sufficiency of the claims in the complaint. “Dismissal can be based on the lack of a
8 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
9 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In such a
10 motion, all material allegations in the complaint must be taken as true and construed in the light
11 most favorable to the claimant. *See Balistreri*, 901 F.2d at 699. However, “[t]hreadbare recitals
12 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
13 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, “the court is not required to accept
14 legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably
15 be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th
16 Cir. 1994).

17 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
18 claim showing that the pleader is entitled to relief.” This means that the “[f]actual allegations
19 must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*
20 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). *See*
21 *also Iqbal*, 129 S. Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief
22 survives a motion to dismiss.”). However, a complaint attacked by a Rule 12(b)(6) motion to
23 dismiss does not need detailed factual allegations and “heightened fact pleading of specifics” is
24 not required to survive a motion to dismiss. *Bell Atlantic Corp.*, 550 U.S. at 570. Rather, the
25 complaint need only give “enough facts to state a claim to relief that is plausible on its face.”
26 *Id.*

DISCUSSION

A. Defendant Federal National Mortgage Association

Defendants move to dismiss Federal National Mortgage Association (Fannie Mae) on the ground that there is no allegation showing that Fannie Mae has any connection to this litigation. Plaintiff does not oppose dismissal of this defendant. Accordingly, Fannie Mae is dismissed with prejudice.

B. Ability to Tender

As a threshold matter, defendants argue that all claims asserted in the complaint must be dismissed because plaintiff has not alleged tender of amounts required to cure her default. Citing *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003), plaintiff argues that she need not demonstrate her ability to tender the loan proceeds. Plaintiff's reliance on *Yamamoto* is misplaced. In the context of claims arising under the Truth in Lending Act (TILA), the Ninth Circuit has held that a district court may alter the statutory rescission procedures and has "discretion to condition rescission on tender by the borrower of the property he had received from the lender." *Yamamoto*, 329 F.3d at 1171 (internal quotation marks and citation omitted). District courts within the Ninth Circuit have adopted different understandings of *Yamamoto*; one line of cases reads it to require a plaintiff to plead the present ability to tender the loan proceeds in order to survive a motion to dismiss, while another line holds that it does not. See *Kakogui v. Amer. Brokers Conduit*, No. C09-4841 JF (HRL), 2010 WL 1265201, at *4 (N.D. Cal. Mar. 30, 2010) (collecting cases).

Plaintiff has not, however, alleged a claim for relief under TILA; and, it is not clear, that flexibility with respect to the tender requirement is appropriate for claims under California law. Indeed, "courts in California continually treat tender or at least the allegation of ability to do so as a necessary part of a valid claim for rescission of a contract." *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp.2d 862, 880 (N.D. Cal. 2010). Here, the complaint alleges only that "Plaintiff is willing, able, and ready to execute a *modification* of their loan on a reasonable basis." (Complaint ¶ 95) (emphasis added). She otherwise alleges that tender should be excused "by obstruction or prevention or imposition of unwarranted conditions by the person or

corporate entity to which it was to be made.” (*Id.* ¶ 100). The complaint further alleges that defendants prevented plaintiff from offering tender by “evad[ing] the Plaintiff”[s] attempts to provide tender,” “manifest[ing] to the Plaintiff that tender, if made, will not be accepted,” or alternatively, waived their objection to lack of actual tender by their “refusal to receive the money if produced.” (*Id.* ¶¶ 102-103). These are merely threadbare recitals supported only by conclusory statements and do not survive dismissal. *Iqbal*, 129 S. Ct. at 1949. Nowhere in the complaint does plaintiff allege credible tender of the amount of the secured debt. Accordingly, defendants’ motion to dismiss as to this issue is granted with leave to amend.²

C. California Civil Code § 2923.6

Plaintiff alleges that defendants are obliged, under California Civil Code section 2923.6, to modify her loan. Defendants move to dismiss on the grounds that (a) there is no such obligation under that statute; and (b) the statute does not, in any event, create a private right of action. Defendants appear to be correct as a matter of law. *See Mabry v. Super. Ct.*, 185 Cal. App.4th 208, 110 Cal. Rptr.3d 201 (2010) (holding that “Section 2923.6 merely expresses the hope that lenders will offer loan modifications on certain terms.”). Indeed, numerous district courts have concluded that nothing in section 2923.6 requires defendants to modify loans or creates a private right of action for borrowers. *See, e.g., Washington v. Nat’l City Mortgage Co.*, No. C10-5402SBA, 2010 WL 5211506 *5 (N.D. Cal., Dec. 16, 2010) (“But even if [the statute applied], § 2923.6 does not create a cause of action for borrowers”); *Owens v. Wells Fargo Bank, N.A.*, No. C09-3354PJH, 2010 WL 424473 *2 (N.D. Cal., Jan. 27, 2010) (“However, as defendant notes, section 2923.6 neither grants any right to a loan modification, nor provides a private right of action to compel a loan modification or defend against foreclosure.”); *Reynoso v. Chase Home Finance*, No. C09-02190MEJ, 2009 WL 5069140 *4-5 (N.D. Cal., Dec. 17, 2009) (concluding that section 2923.6 does not impose a duty on lenders to negotiate loan modifications or create a private right of action for purported violations of its

² In her opposition, plaintiff also contends that the tender requirement should be excused because “Defendants caused the ruin of Plaintiff’s credit” and that the defendants’ substitution of trustee is of questionable validity. (Opp. at 5). Suffice to say that these allegations do not appear in the complaint. Would such allegations—if proven—excuse tender?

provisions); *Farner v. Countrywide Home Loans*, No. 08cv2193, 2009 WL 189025 *2 (C.D. Cal., Jan. 26, 2009) (“However, nothing in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans to modify the terms of loans or creates a private right of action for borrowers.”).

Plaintiff cites no authority to the contrary.³ This claim is dismissed without leave to amend.

D. Breach of Covenant of Good Faith and Fair Dealing

The complaint alleges that defendants essentially owed plaintiff a duty of care—i.e., “to safeguard, protect, or otherwise care for the rights and assets of Plaintiff.” (Complaint ¶ 112).

“[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App.3d 1089, 1095, 283 Cal. Rptr. 53 (1991). Courts have applied this rule to loan servicers. *See, e.g., Hendrickson v. Popular Mortgage Servicing, Inc.*, No. C09-00472 CW, 2009 WL 1455491 *7 (N.D. Cal., May 21, 2009); *Marks v. Ocwen Loan Servicing, Inc.*, No. C07-02133 SI, 2009 WL 975792 *7 (N.D. Cal., Apr. 10, 2009). Moreover, “[t]he trustee in a nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.” *Pro Value Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal. App.4th 579, 583, 88 Cal. Rptr.3d 381 (2009) (citing *Vournas v. Fidelity Nat. Title Ins. Co.*, 73 Cal. App.4th 668, 677, 86 Cal. Rptr.2d 490 (1999)). “The scope and nature of the trustee’s duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist.” *Id.* Plaintiff has not alleged that defendants’ involvement in the subject loan transaction exceeded their conventional roles. This claim is dismissed with leave to amend.

E. Injunctive Relief

Plaintiff essentially seeks to enjoin defendants from foreclosing on her property on the ground that they do not have physical possession of the promissory note. (Complaint ¶¶118-126). “As courts have repeatedly emphasized, such a theory is ‘unsupported and incorrect.’” *Davenport*, 725 F. Supp.2d at 880 (quoting *Hafiz v. Greenpoint Mortgage Funding*, 652 F.

³ Inasmuch as plaintiff’s claim is based on California Civil Code section 2923.6, her argument that she has a private right of action under California Civil Code section 2923.5 is beside the point.

Supp.2d 1039, 1043 (N.D. Cal. 2009)). “California law does not require possession of the note as a precondition to non-judicial foreclosure under a deed of trust. . . . Moreover, the trustee has the power and the duty to initiate foreclosure proceedings on the property upon the trustor’s default.” *Id.* (internal quotations and citations omitted). The facts alleged in the complaint do not give rise to a cognizable legal claim. In any event, injunctive relief is a form of relief rather than an actual claim. This claim is dismissed without leave to amend.⁴

F. Actual Fraud (Cal. Civil Code § 1572); Common Law Fraud/Misrepresentation

A “party must state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). Allegations of fraud must be stated with “specificity including an account of the ‘time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). To survive a motion to dismiss, “‘allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.’” *Id.* (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

The gist of plaintiff’s fifth, sixth, and eighth claims for relief is that defendants misrepresented or failed to disclose the true terms of the loan, and plaintiff was duped into accepting a loan she could not afford. Plaintiff alleges that some unknown person at Bank of America told her that her credit rating was not good, and that this representation was false. (Complaint ¶ 14). Beyond that, and without distinguishing between defendants, the complaint alleges only that each defendant “entered into a fraudulent scheme” and “falsely represented to Plaintiff that she could not qualify for any other financing,” all for the purpose of deceiving her

⁴ In her opposition, plaintiff suggests that this claim essentially should be evaluated under the standards applicable to a motion for temporary restraining order. No such motion has been brought before this court. And, this court does not view plaintiff’s claim, buried within a rambling 47-page complaint, to be properly construed as such a motion.

1 into entering a loan they knew she could not afford. (*Id.* ¶ 20).⁵ The court finds that the
 2 elements of fraud are not sufficiently alleged. *Bell Atlantic Corp.*, 550 U.S. at 555 (“Factual
 3 allegations must be enough to raise a right to relief above the speculative level.”); *Iqbal*, 129 S.
 4 Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief survives a motion to
 5 dismiss.”). Defendants’ motion to dismiss these claims is granted with leave to amend.

6 G. Wrongful Foreclosure

7 Plaintiff alleges that defendants cannot legitimately proceed with foreclosure of the
 8 subject property because they (a) do not possess the promissory note; (b) did not record an
 9 assignment in violation of California Civil Code section 2932.5; and (c) failed to include a
 10 Declaration of Due Diligence with the Notice of Default, in violation of California Civil Code
 11 sections 2923.5 and 2924.

12 To the extent plaintiff’s claim for wrongful foreclosure is based on her theory that
 13 defendants do not hold the promissory note, defendants’ motion to dismiss is granted without
 14 leave to amend. As noted above, California law does not require possession of the note as a
 15 precondition to non-judicial foreclosure under a deed of trust. *Davenport*, 725 F. Supp.2d at
 16 880.

17 With respect to the alleged violation of California Civil Code § 2932.5, plaintiff claims
 18 that any power of sale in the deed of trust is invalid because defendant Bank of America failed
 19 to record the assignment of the deed of trust. (Complaint ¶¶ 178-179). However, “Section
 20 2932.5 applies to mortgages, not deeds of trust. It applies only to mortgages that give a power
 21 of sale to the creditor, not to deeds of trust which grant a power of sale to the trustee. Trustees
 22 regularly foreclose on behalf of assignees for the original beneficiary.” *Roque v. Suntrust*
 23 *Mortgage, Inc.*, No. C09-00040RMW, 2010 WL 546896 *3 (N.D. Cal., Feb. 10, 2010) (citing
 24 *In re Golden Plan of Cal., Inc.*, 829 F.2d 705, 708-11 (9th Cir. 1986)). Thus, to the extent
 25

26 ⁵ The complaint also alleges that an unknown employee of defendant
 27 Recontrust executed a “Notice of Default,” which allegedly contained false
 28 representations—i.e., documents were not provided showing that Fannie Mae was the
 Beneficiary entitled to the loan payments. (Complaint ¶¶ 140-145). Inasmuch as plaintiff
 agrees that Fannie Mae should be dismissed from this action, this allegation does not save
 plaintiff’s complaint from dismissal.

1 plaintiff's wrongful foreclosure claim relies on this theory, it is dismissed without leave to
2 amend.

3 As for the alleged failure to comply with the due diligence requirements of California
4 Civil Code section 2923.5, plaintiff's claim also fails. That statute provides that a "mortgagee,
5 trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section
6 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after
7 satisfying the due diligence requirements as described in subdivision (g)." CAL. CIV. CODE §
8 2923.5(a)(1). However, by its own terms, section 2923.5 applies "only to mortgages or deeds
9 of trust recorded from January 1, 2003 to December 31, 2007, inclusive, that are secured by
10 owner-occupied residential real property containing no more than four dwelling units." *Id.*
11 §2923.5(h)(3)(i). As alleged in the complaint itself (Complaint ¶ 147), and as plaintiff
12 acknowledged at oral argument, the loan transaction in question closed in January 2008—i.e.,
13 after the time period during which section 2923.5 applies. To the extent plaintiff's wrongful
14 foreclosure claim is based on this statute, the claim is dismissed without leave to amend.

15 Non-judicial foreclosures are governed exclusively by California Civil Code section
16 2924-2924i. *Roque*, 2010 WL 546896 at *3. Here, plaintiff alleges that defendants failed to
17 comply with certain procedural requirements in violation of California Civil Code sections
18 2924b, 2924f, and 2924g—i.e., that defendants failed to timely mail the Notice of Default,
19 failed to timely publish the Notice of Sale, and failed to record the Notice of Sale. However,
20 "[u]nder a claim for wrongful foreclosure, a plaintiff must allege a credible tender of the amount
21 of the secured debt to maintain any cause of action." *Id.* (citing *Abdallah v. United Savings*
22 *Bank*, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (Ct.App.1996)). "It is settled that an
23 action to set aside a trustee's sale for irregularities in sale, notice, or procedure should be
24 accompanied by an offer to pay the full amount of the debt for which the property was
25 security." *Id.* As discussed above, plaintiff has failed to do so. Moreover, "[w]hen attacking a
26 non-judicial foreclosure sale, a borrower must overcome a presumption of propriety."
27 *Davenport*, 725 F. Supp.2d at 877 (citing *Knapp v. Doherty*, 123 Cal.App.4th 76, 86 n. 4, 20
28 Cal.Rptr.3d 1 (2004)). "She may do this by proving an improper procedure occurred and by

demonstrating resulting prejudice.” *Id.* The complaint’s allegations suggest that Jacobs may have had notice of the contents of the notice of default and notice of sale several months before the notice of default was recorded. (Complaint ¶¶ 12, 17, 146).] Accordingly, her claim for wrongful foreclosure under California Civil Code section 2924-2924i is dismissed with leave to amend.

H. Declaratory Relief

Jacobs challenges the “ownership rights and the validity of the commencement of the foreclosure process” based on defendants’ alleged fraudulent and predatory loan practices. (Complaint ¶¶ 171-175). Plaintiff, however, has not sufficiently pled any of her claims of misconduct against defendants. In any event, declaratory relief “is correctly understood as a form of relief,” rather than a separate claim. *Davenport*, 725 F. Supp.2d at 880. Accordingly, this claim is dismissed without leave to amend.

I. California Bus. & Prof. Code § 17200

California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” CAL. CIV. CODE § 17200. “Violation of almost any federal, state, or local law may serve as the basis for a[n] unfair competition claim.” *Brewer v. Indymac Bank*, 609 F. Supp.2d 1104, 1122 (E.D. Cal. 2009) (quoting *Plascencia v. Lending 1st Mortgage*, 583 F. Supp.2d 1090, 1098 (N.D. Cal. 2008)). “A complaint based on an unfair business practice may be predicated on a single act; the statute does not require a pattern of unlawful conduct.” *Id.* However, facts supporting the statutory elements of the alleged violation must be stated with reasonable particularity. *See Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1316 (N.D.Cal. 1997). Because all of plaintiff’s underlying claims for relief are being dismissed, plaintiff’s UCL claim is dismissed with leave to amend.

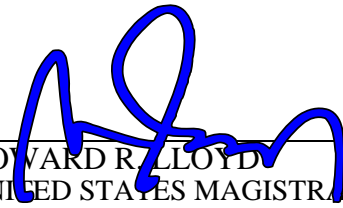
ORDER

Based on the foregoing, defendants’ motion to dismiss is granted. The court need not reach defendants’ alternate motion to strike. Plaintiff is given leave to amend in accordance

1 with this order. Any amended pleading shall be filed within 15 days from the date of this order.

2 SO ORDERED.

3 Dated: January 25, 2011

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6 HOWARD R. LLOYD
7 UNITED STATES MAGISTRATE JUDGE
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1 5:10-cv-04596-HRL Notice has been electronically mailed to:

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